

NO. 79975-0

WASHINGTON STATE SUPREME COURT

MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH
COUNTIES, and BUILDING INDUSTRY ASSOCIATION OF
WASHINGTON,

Petitioners/Appellants,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS
BOARD; WASHINGTON STATE DEPARTMENT OF ECOLOGY;
WASHINGTON STATE DEPARTMENT OF COMMUNITY, TRADE
AND ECONOMIC DEVELOPMENT; LIVABLE COMMUNITIES
COALITION; CITY OF KENT; WASHINGTON ASSOCIATION OF
REALTORS; and CITIZENS ALLIANCE FOR PROPERTY RIGHTS,

Defendants/Respondents

CITY OF KENT,

Petitioner/Appellant,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARING
BOARD; WASHINGTON STATE DEPARTMENT OF ECOLOGY;
WASHINGTON STATE DEPARTMENT OF COMMUNITY, TRADE
AND ECONOMIC DEVELOPMENT; LIVABLE COMMUNITIES
COALITION; MASTER BUILDERS ASSOCIATION OF KING AND
SNOHOMISH COUNTIES and BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON; WASHINGTON ASSOCIATION
OF REALTORS; and CITIZENS ALLIANCE FOR PROPERTY
RIGHTS,

Respondents.

STATE AGENCIES' REPLY BRIEF RE MOOTNESS

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INTRODUCTION

In the State Agencies' Response Brief, filed February 1, 2007, the Washington State Department of Ecology and the Washington State Department of Community, Trade and Economic Development (State Agencies) moved to dismiss this appeal as moot. The City of Kent (Kent) and the Master Builders Association of King and Snohomish Counties/Building Industry Association of Washington (MBA/BIAW) answered the motion in their reply briefs on the merits. This brief is a reply to their answers, as permitted in RAP 7.4(e) for motions of this type.

I. ARGUMENT

The State Agencies moved to dismiss this appeal because the portions of Ordinance 3746 that did not comply with the GMA have been superseded by a new, compliant ordinance. State Agencies' Response Brief at 6-12. Kent and MBA/BIAW answer the motion by alleging a "lack of candor and goodwill toward both the Court and the other parties involved in this appeal." Kent Reply Brief at 2; MBA/BIAW Reply Brief at 8-9.¹

The allegation is unwarranted and unsupported by any evidence in the record. The State Agencies' motion to dismiss is fairly before the Court and should be decided on its merits.

¹ Kent also alleges the State Agencies' motion demonstrates a lack of confidence. The allegation is irrelevant and untrue and should be disregarded.

A. There Has Been No Lack of Candor or Goodwill by the State Agencies or Their Attorneys

The State Agencies strongly dispute Kent's allegations that they or their representatives have exhibited a lack of candor or goodwill. The allegations are made without any supporting facts in the record, they are irrelevant to the motion at issue, and the Court should not consider them. *Weems v. North Franklin School Dist.*, 109 Wn. App. 767, 778-79, 37 P.3d 354 (2002) (appellate courts will not consider allegations that are irrelevant and outside of the record); *Lewis v. Mercer Island*, 63 Wn. App. 29, 32, 817 P.2d 408, *review denied*, 117 Wn.2d 1024 (1991) (factual allegations not supported by the record are not considered by the appellate court). *See also Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 193 n.20, 23 P.3d 440 (2001) ("Bare assertions in appellate briefs do not constitute evidence").

The State Agencies believe the Court ought not consider extra-record information provided by any party. However, to the extent the Court decides to consider the Appellants' allegations of lack of candor and good will, the following paragraphs provide additional extra-record information solely to respond to those allegations.

To discern whether the State Agencies had made any agreement at any level to forego some litigation position (including informing the court

of the mootness of the appeal, or moving to dismiss as moot), the undersigned attorneys met with the State Agency directors and a representative of the Governor's Office, as well as program staff in the State Agencies, and reviewed their communications with the City. There was no such agreement.

After the Growth Management Hearings Board issued its Final Decision and Order on April 19, 2006, the State Agencies and Kent initiated discussions as to appropriate actions to be taken in response. Having received a strong decision from the Board, the State Agencies took the position that the City needed to come into compliance with the GMA's requirements, as set forth by the Board.

The first telephone call referenced in the City's reply brief (at pages 2-3), appears to be a call that occurred on May 9, 2006. In that call, the City's attorneys (including Mr. Walter) posed a series of questions to one of the undersigned attorneys (Mr. Copsey) as to how settlement and procedure would be affected if Kent were to appeal or were to join the appeal already announced by MBA/BIAW. The City's attorneys asked (1) whether the State would continue to work with the City on settlement if the City were to appeal; and (2) whether the appeal could be dismissed if the City and State Agencies reached a settlement in which MBA/BIAW did not concur. Mr. Copsey responded (1) that the State Agencies wanted

to work toward settlement and the City's filing of an appeal would not necessarily stop settlement discussions; and (2) that the City and the State Agencies could jointly file a motion to dismiss for mootness if settlement discussions resulted in the adoption of an ordinance that complied with the GMA. There was no agreement sought or reached as to whether an appeal should go forward or as to any party's litigation position in an appeal. A week later, on May 16, 2006, the Kent City Council voted both to engage in settlement negotiations with the State Agencies and to appeal.

On May 25, 2006, the City Attorney (Mr. Brubaker) and Mr. Copsey discussed settlement issues in a telephone call, during which Mr. Brubaker indicated there was substantial support on the City Council for continuing the appeal even if settlement were achieved. Mr. Copsey indicated the State Agencies were inclined to make dismissal of the appeal a condition of settlement. Mr. Brubaker and Mr. Copsey agreed the issue would need to be discussed further.

The issue was discussed further in the second telephone conference referenced in the City's reply brief (at pages 3-4), which occurred on June 15, 2006. The call was arranged to allow the Mayor of Kent and the State Agency directors to discuss settlement options. Both Mr. Brubaker

and Mr. Copsey were present on the telephone conference.² The first question raised by the Director of Ecology in the conference call was whether it was meaningful to talk about settlement if the City insisted on pursuing an appeal, and he repeated several times in the discussion his position that settlement must include an end to the litigation. While the parties reached agreement as to a process for timely amending the critical areas ordinance to comply with the Board's decision, the City did not agree to forego an appeal and the State Agencies did not agree to forego any litigation option regarding the City's appeal.³

In sum, there was no promise or agreement by the State Agencies or their representatives to take or forego any litigation position on appeal, nor has there been any lack of candor or good faith.

B. The State Agencies Did Not "Threaten" to Withhold Water Quality Project Funding from the City of Kent

MBA/BIAW allege the State Agencies threatened to withhold state funding of various water quality projects unless the City "immediately

² Assistant Attorney General Tom Young, attorney for Ecology, was not present on the call. See Kent Reply Brief at 3 (mistakenly listing Mr. Young as a participant).

³ Kent asserts that Jay Manning, Director of Ecology, "stated that if the City could pass the new ordinance quickly, without using up a lot of [Ecology's] staff time, he would have no objection to the City pursuing its appeal." Kent Reply Brief. at 3-4. The State Agencies dispute this assertion. Mr. Manning stated his reluctance to invest state resources in an ordinance in which the City Council was not invested, and he focused on whether a new GMA-compliant ordinance could be adopted quickly enough to allow an opportunity for the City and State to discuss dismissing the City's appeal before it proceeded too far. Indeed, near the end of the call, Mr. Manning proposed a future course of discussion and stated his explicit desire to end the litigation. Both the Mayor of Kent and Mr. Brubaker agreed.

amended its wetland regulations to conform to the Growth Board's decision." MBA/BIAW Reply Brief at 2, 8. Again, MBA/BIAW's allegation is made without citation to any evidence, and the Court need not address it.

Nevertheless, it is not a "threat" for a state agency to inform a city or county which is out of compliance with the GMA that it may not be eligible for a state loan or grant administered by that agency. State agencies are required under RCW 36.70A.130(7) and RCW 43.17.250 to give preference to counties and cities that are in compliance with the GMA when awarding grants and loans for public facilities in counties and cities that plan under the GMA. Some statutes explicitly condition eligibility for state loans or grants on a city or county's compliance with the GMA. *See, e.g.*, RCW 36.70A.500 (Growth Management Planning and Environmental Review Fund); RCW 43.155.070 (Public Works Trust Fund); RCW 70.146.070 (Centennial Clean Water Fund). *See also* RCW 36.70A.130(7), (9) and (10) (noncompliance with GMA update requirements a condition of eligibility).

C. The State Agencies Did Not Waive Their Mootness Argument

The City suggests the State Agencies' mootness argument should be deemed waived since the motion was not raised before the Court of Appeals accepted direct review. Kent Reply Brief at 6 n.4. The City cites

no authority for that argument, and the State Agencies are aware of none. A motion to dismiss for mootness is directed at the Court's jurisdiction and may be raised at any time. *See Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 350, 662 P.2d 845 (1983). RAP 10.4(d) specifically allows such a motion to be included in a brief.


In addition, the matter was not moot until the Board determined the City's replacement ordinance was in compliance with the GMA. That determination was made on December 13, 2006, when the Board's Order on Compliance was entered.⁴

II. CONCLUSION

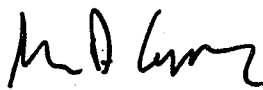
The Court should dismiss this consolidated appeal as moot.

RESPECTFULLY SUBMITTED this 4th day of April, 2007.

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⁴ A copy of the Order Finding Compliance was attached to the State Agencies' Response Brief.